Supreme Court, U.S.
FILED

06-441 SEP 26 2006

OFFICE OF THE CLERK

No._____

---

**IN THE SUPREME COURT OF THE UNITED STATES**

---

BRIAN MCCUISTON, Petitioner,

V.

UNITED STATES OF AMERICA, Respondent

---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

# PETITION FOR WRIT OF CERTIORARI

---

Stephen M. Orr
804 Rio Grande
Austin, Texas 78701
(512) 472-8392
FAX (512) 473-8417
*Counsel of Record for Petitioner*

## QUESTIONS PRESENTED FOR REVIEW

I. Whether a United States court of appeals has decided an important federal question in a way that conflicts with a relevant decision of this Court; namely, the determination of whether the proof at trial varied from the indictment to deprive McCuiston of his Fifth And Sixth Amendment rights?

II. Whether a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; namely, that evidence of juvenile conduct from the age of twelve can be admitted and form the basis of adult criminal liability?

III. Whether a United States court of appeals has decided an important federal question in a way that conflicts with a relevant decision of this Court; namely, the determination of whether inclusion of relevant conduct in computing the advisory Guideline sentence violated McCuiston's Sixth Amendment rights?

## LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), the parties to the proceedings below were Petitioner Brian McCuiston and the United States of America. The United States is the Respondent before this Court.

## TABLE OF CONTENTS


QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 7

I. A United States court of appeals has decided an important federal question in a way that conflicts with a relevant decision of this Court; namely, the determination of whether the proof at trial varied from the indictment to deprive McCuiston of his Fifth And Sixth Amendment rights.

II. A United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; namely, that evidence of juvenile conduct from the age of twelve

can be admitted and form the basis of adult criminal liability.

III. A United States court of appeals has decided an important federal question in a way that conflicts with a relevant decision of this Court; namely, the determination of whether inclusion of relevant conduct in computing the advisory Guideline sentence violated McCuiston's Sixth Amendment rights.

CONCLUSION 22

APPENDIX 23

## TABLE OF AUTHORITIES

CASES


Apprendi v. United States,
530 U.S. 466,(2000) 13

Berger v. United States,
295 U.S. 78 (1935) 7

Dunn v. United States,
442 U.S. 100 (1979) 9-10

Jackson v. Virginia,
443 U.S. 307 (1979) 7

Kotteakos v. United States,
328 U.S. 750 (1946) 7-8, 14

United States v. Booker,
125 S.Ct. 738 (2005)

United States v. Maddox, 944 F.2d 1223
(6th Cir. 1991), cert. denied,
502 U.S. 992 (1991) 16-17, 20-21

United States v. Tolliver,
61 F.3d 1189 (5th Cir. 1995) 15-16, 20-21

United States v. Wong, 40 F.3d 1347
(2nd Cir. 1994), cert. denied,
516 U.S. 870 (1995) 15, 16

## OPINION BELOW

The unpublished opinion of the Court of Appeals for the Fifth Circuit styled *United States v. Brian McCuiston,* No. 05-40908, issued on June 28, 2006, is attached hereto as Appendix A.

## JURISDICTION

The United States District Court was granted exclusive original jurisdiction over this case by 18 U.S.C. § 3231.

Appeal was made from the final judgment of the District Court to the Fifth Circuit Court of Appeals under 28 U.S.C. § 1291.

The Court of Appeals affirmed in an order entered June 28, 2006. There was no petition for rehearing. This petition follows within 90 days of the judgment of the Court of Appeals.

The jurisdiction of this Court to grant certiorari is invoked pursuant to 28 U.S.C. § 1254(1).

The United States is a party to be served, and the undersigned states that service has been made on the Solicitor General of the United States, Room 5614, Dept. of Justice, 950 Pennsylvania Ave NW, Washington DC 20530-0001, pursuant to Supreme Court Rules 14.1(e)(v) and 29.4(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V

No person shall be held to answer for a

capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

## STATEMENT OF THE CASE

Petitioner McCuiston was tried for being a member of a conspiracy that began in 1993 and ended in 2004. In 1993 McCuiston was twelve years old. Because McCuiston challenges the sufficiency of the evidence, especially because there is a fatal variance between the allegation and the evidence at trial, it is necessary to delve into the history of what the government contends is a single conspiracy. The

constant changes in the personnel, modus operandi, geographical location and scale of the "conspiracy" show that there is little or nothing that forges a single criminal enterprise out of such disparate elements.

**The early years.** In 1993, as the conspiracy begins, McCuiston is twelve years old. His fellow conspirators Richard Daniel and Robert Mott are, respectively, twelve and fourteen. Daniel, Mott, and McCuiston know each other because they were friends in grade school.

Daniel and McCuiston do not run any kind of organization at this time. Instead, they fall prey to neighborhood drug dealers who use them as runners and small time dealers. The older men viewed Daniel and McCuiston as "little kids."

Daniel characterized these neighborhood figures as "a small group of friends." The initial cast included McCuiston, Daniel, Mott, Frank Tijerina, Raymond Tijerina, Joseph Murillo, Adam White, Charles Cory, Frank Valenzuela, Henry Rivera, Jose Salinas, Michael Lumpkin, and Anthony Constancino. This small group of friends came up with a name for themselves, namely the "CC Mob." One did not necessarily have to be member of the CC Mob in order to be involved in the drug business of its members; Rivera, for example, was not a member.

The older dealers imported methamphetamine from California and sold it in Corpus Christi. Daniel and McCuiston looked up to the older members of the CC Mob, such as Frank Valenzuela, Anthony Constancino, and Jose Salinas. Daniel would sell drugs for them. McCuiston and Mott would also "occasionally" deal for them. The amounts sold typically were only a gram or three.

**The 1998 drug bust**. By 1997 McCuiston and his friends starting selling larger amounts. Instead of selling a few grams a month, they now started to sell several ounces a month. There is a change in personnel, as one William Clinton McCoy becomes the man with the connection - Daniel says that he "joins" the group in 1997. According to some of the Government's witnesses, Frank Valenzuela and Anthony Constancino were now in jail.

The drug dealing of 1997 and 1998 was quite different from that of the earlier nineties. For example, Jose Salinas bought drugs from Frank Valenzuela in 1995 and then he went to prison. When he returned from prison in 1998, he found the scenery quite changed: "different people [had] taken over the distribution of methamphetamine after I had gotten out of prison." To Salinas, the new people were Frank Tijuerina, Daniel and McCuiston.

In 1998, Daniel testified that he entered into a partnership agreement with McCuiston wherein they went in together to buy a pound of methamphetamine from McCoy. It seems that the partnership consisted only of pooling their money to get a better deal, though - "mainly you were somewhat independent." Daniel had already given money to McCoy three or four times for McCoy to bring back methamphetamine from California; this was the first time Daniel had pooled his money with McCuiston.

The deal went bad. An informant told the Corpus Christi police department about McCoy's methamphetamine and the police executed a warrant on July 1, 1998. McCoy went to prison for his role; his incarceration began in 2000 and he was still

serving his time at McCuiston's trial. McCuiston was not charged or arrested.

**1998 to 2001: CC Mob Diaspora.** The drug bust caused the CC Mob and its associates to break up. For several years Daniel, Mott, and McCuiston would wander from state to state, seeing each other only some of the time. Because McCuiston's legal theory is that there was no evidence of a single conspiracy, as charged in the indictment, the various movements of the charged conspirators are set forth below.

Mott moved to a small town in Oregon. Daniel, who was on parole from the Texas Youth Commission for a drug offense, also went to Oregon. After a "while" they was joined there by McCuiston and Adam White. Then Daniel and McCuiston moved to Kansas, joining Mott and McCuiston's brother Eric.

Soon afterwards, Daniel was arrested on his Texas Youth Commission warrant and brought back to Texas. Daniel spent at least ninety days in custody before being released to his father, who lived in Houston. Daniel then worked with his father doing carpentry work in Houston for six or seven months. During this time Daniel no longer associated with drug dealing. After his sojourn in Houston, Daniel went back to Kansas. At that time Mott had left, so he stayed with McCuiston and his brother for two months, selling methamphetamine.

Daniels' peregrinations continued. He came back to Corpus Christi and stayed for a month. Then, in 2000, he and Mott moved to Oklahoma. Daniel remained in Oklahoma for eight months until he was arrested for drugs. Daniel was then returned to Texas where he was incarcerated for a year for

various crimes such as kidnaping and assault.

Mott also moved to Kansas before returning to Corpus Christ in 1999. Mott then sold cocaine and marijuana. After a year in Corpus Christi, Mott moved to Oklahoma "to try and get away from drugs." He sold drugs in Oklahoma anyway. Mott stayed in Oklahoma until 2000, when he briefly returned to Corpus Christi for a few months. By March of 2000, Mott had gone back to Oklahoma.

Mott - a Government witness - denied the prosecutor's assertion that there had been concerted activity during this time. "So you all were moving, I guess, as a group collectively 2 or 3 [pounds] a month?" Mott answered, "No. I'd probably say about 2000, 2001 we were more of a group."

**2001 to 2004.** In December of 2001, Daniel became "partners" with McCuiston, Mott, and Frank Tijerina. The purpose of the partnership was to put their money together and buy in bulk so they could get better prices. Almost alone of the original CC Mob cast, Charles Cory also joined in the drug business. Cory's role was to use his house for cutting the drugs and be a transporter.

McCuiston went to trial and a jury found him guilty. Punishment was assessed at 280 months confinement, Appeal was duly made the Fifth Circuit court of Appeals, which affirmed his conviction and sentence on June 28, 2006.

## REASONS FOR GRANTING THE WRIT

**I. A United States court of appeals has decided an important federal question in a way that conflicts with a relevant decision of this Court; namely, the determination of whether the proof at trial varied from the indictment to deprive McCuiston of his Fifth And Sixth Amendment rights.**

**Multiple v. Single Conspiracy**. The Fifth Amendment provides in part that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V. The indictment in this case charged a single Texas conspiracy that ran from 1993 to 2004. At most, the Government's case suggests that defendants were involved in multiple conspiracies. The Fifth Circuit disagreed: "This view of the evidence would not preclude a finding of a single conspiracy beyond a reasonable doubt."

The Fifth Circuit analysis is incorrect. While technically a correct recitation of the sufficiency of evidence standard of *Jackson v. Virginia,* 443 U.S. 307, 316 (1979), there are plainly multiple conspiracies in this case. Vast discrepancies exist in terms of geography, personnel, modus operandi, and chronology. None of the charged defendants even worked together until 1998. Under *Kotteakos v. United States*, 328 U.S. 750 (1946) and *Berger v.*

*United States*, 295 U.S. 78 (1935), the fact that there was a common conspirator and a common statutory violation is not enough to make a single conspiracy. The Fifth Circuit's analysis approves of what *Kotteakos* disapproved of: the defendants were together at some times and they committed the same offense, selling drugs:

> When the CC Mob collapsed the three friends banded together and moved to Oregon and then Kansas to escape law enforcement and to continue to sell methamphetamine. As time went on the three continued their concerted methamphetamine distributing to the point where they operated in different cities.

The Fifth Circuit exaggerates the time spent in Oregon and Kansas as being in concert; they were not in concert or otherwise banded together and they were often separated, sometimes for years.[1] At

---

[1] The Government's case - to the extend it shows conspiracies at all - shows a Corpus Christi conspiracy that definitely ends in July of 1998. One might infer a Oregon conspiracy from July 1998 to early 1999. In late 1999 Mott, McCuiston, and Daniel briefly stay together in Kansas. This might be followed by a Mott-Daniel conspiracy in Oklahoma in the year 2000. In December 2001, Daniel and McCuiston are back in Corpus Christi, but Mott remains in Oklahoma. In between are all sorts of time periods when people go to jail, stop drug dealing, move back to Texas, and the like.

one point, McCuiston did not associate with Daniel and Mott from late 1999 until December 2001, a period of two years.

The Fifth Circuit's reliance on the activities in Oregon and Kansas actually underscores McCuiston's argument of variance: **the indictment does not charge them with criminal acts in Oregon or Kansas.**[2] What is a reasonable defendant supposed to do when he is accused of committing crimes in Texas when he knows he has not even been in Texas during the several years during which he allegedly committed a crime there? That defendant cannot be faulted for pleading not guilty and going to trial, confident that the Government's case must fail because the Government cannot prove what it has alleged. To then convict that defendant even though the Government did not prove what is alleged violates due process.

This is like the fatal variance in *Dunn v. United States*, 442 U.S. 100 (1979). In that case the defendant was indicted for perjury he committed at a hearing in September. The government instead introduced proof that he committed perjury in October at a different hearing. This Court found the variance to violate his substantial rights because the Government

---

[2] The indictment alleges that the conspiracy took place "in the Southern District of Texas and elsewhere in the jurisdiction of this court."

proved a different crime than the one it alleged:

> The jury might well have reached the same verdict had the prosecution built its case on petitioner's October 21 testimony adopting his September 30 statement rather than on the September statement itself. But the offense was not so defined, and appellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial.

*Dunn*, at 107.

But the variance in McCuiston's trial is not limited to mere geography. As set forth in this application's statement of fact, the initial group of people involved in buying and selling drugs changed dramatically. In the 1993 to 1997 period, these people were McCuiston, Daniel, Frank Tijerina, Raymond Tijerina, Joseph Murillo, Adam White, Charles Cory, Frank Valenzuela, Henry Rivera, Jose Salinas, Michael Lumpkin, and Anthony Constancino. The period of 1997 to 1998 saw additional changes as Mott became active in drug selling, McCoy becomes the big dealer, Constancino goes to jail, and Frank Valenzuela goes to prison, or Hawaii, or both, depending on which informant you ask.

Then, from July 1998 until December of 2001, these various people disperse about the country. Sometimes they meet up and live with one another. Sometimes they go to jail. Sometimes they stop selling drugs. Most of the names set forth in the original CC Mob roster are not heard from again. It

is impossible to conceive from the Government's evidenee that there is any sort of single conspiracy going on during this time period.

Finally, in December of 2001, Mott, Daniel and McCuiston (the three people actually named as conspirators in the indictment) along with Frank Tijerina form a "partnership." The only cooperation involved in this partnership is that money is pooled together to buy methamphetamine at a cheaper price. These three alleged and named conspirators stop selling drugs in January of 2004, but the indictment alleges an ongoing conspiracy until November of 2004. Of the original 90's dealers, only Charles Cory, after an absence of seven years from any dealings with McCuiston, Mott, or Daniels, took part in the drug dealing at this time.

The early years feature juveniles as young as eleven years old being used by older drug dealers to perform small scale errands and sales. This takes up the first four or five years of the alleged conspiracy. None of these alleged co-conspirators (McCuiston, Daniel, Mott) import drugs or do anything except what the older drug dealers tell them to do. These older drug dealers, having turned informant, testified against McCuiston at trial. They referred to McCuiston, Daniel and Mott as "little kids" even at McCuiston's trial. These drug dealers operated by using children under the age of 18 to distribute drugs for them.

Then, after a brief period when Frank Tijerina, McCuiston and Daniel tried to sell larger quantities of drugs in 1998, the nature and scope of the criminal activity utterly changed. Everyone moved from Texas. For years McCuiston, Daniel and Mott wandered from Oregon, Kansas, Oklahoma and back

to Texas - as individuals, and not as a band or group. While they did spend time together in Oregon in 1998, during which time they all did sell some drugs, they quickly separated. Mott spent most of his time in Oklahome from 1998 to 2000. For about eight months Mott and Daniel (but not McCuiston) sold methamphetamine together in Oklahoma. It seems that for most of the years between 1999 and 2001, Daniel was completely out of the picture. The record contains little evidence of what McCuiston himself actually did after he left Oregon in early 1999 until December of 2001.

It was in December of 2001 that McCuiston and the others decide to work together. This drug dealing has quite a different "nature and scope" than anything the previous years have indicated. First, the scope is simply larger. Second, instead of buying their drugs from an importer, they themselves take charge of importing the drugs from out of state. Third, in contrast to the pattern and practice of the early 90's, no juveniles are used by them. To their credit, at least McCuiston did not initiate twelve year olds into the drug trade. That was the pattern and practice of the CC Mob, an earlier and different conspiracy that McCuiston might have been tangentially involved in.

**A material variance is *per se* reversible.** The Government's evidence clearly fails to prove one conspiracy. No rational juror could so find. This alone ought to result in a reversal, since there is insufficient evidence as a matter of law to find McCuiston guilty of the charge alleged against him in the indictment. After all, being charged with an indictment is a constitutional right, and under the more recent rigorous Sixth Amendment

jurisprudence, that should end the matter. A defendant has the right to demand that a jury find him guilty of all the elements of the crime with which he is charged. *United States v. Booker,* 125 S.Ct. 738, 748 (2005). "[T]he historical foundation for our recognition of these principles extends down centuries into the common law. '[T]o guard against a spirit of oppression and tyranny on the part of rulers,' and 'as the great bulwark of [our] civil and political liberties,' trial by jury has been understood to require that '*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors . . . .'" *Apprendi v. United States,* 530 U.S. 466, at 477, 120 S. Ct. 2348 (2000). Here, the Government alleged a conspiracy from January 1, 1993 until November 2004. A generous view of the evidence might show that the Government proved a conspiracy that lasted from December 2001 until January 2004.

The Government's failure to prove the charged conspiracy cannot continue to be constitutionally sufficient in light of *Apprendi* and its progeny. Were it otherwise, the procedure of indictment could merely be transformed to the recitation of a statute, and any proof that a defendant violated that statute would be sufficient. But that is not what the constitution requires. It requires an indictment. And it requires that the Government prove what is alleges in the indictment. Here, the Government failed to prove their case.

**Harmless error analysis.** Although McCuiston denies that error analysis in necessary,

*supra*, in the event that this Court considers that the Sixth Amendment is not implicated in the law of material variance, *Kotteakos* governs and McCuiston must prove that the error was not harmless. The fact that McCuiston might have been guilty of the lesser included conspiracies is not controlling:

> All this the Government seeks to justify as harmless error. Again the basis is that because the proof was sufficient to establish the participation of each petitioner in one or more of several smaller conspiracies, none of them could have been prejudiced because all were found guilty, upon such proof, of being members of a single larger conspiracy of the same general character.

The Supreme Court rejected that argument. *Kotteakos*, 328 at 771.

If the Court reject's McCuiston's claim of *per se* error under the Sixth Amendment, McCuiston must identify which of his substantial rights were affected by the variance. McCuiston can identify several: spillover evidence, use of juvenile conduct, a distinct sentencing impact, and fundamental fairness. Each will be discussed in turn.

Most important is the spillover of evidence that allowed the Government to circumvent the Federal Rules of Evidence. This is evidence that would be subject to 404(b) analysis if McCuiston had only been indicted for a 2001 to 2004 conspiracy and the Government sought admission of extraneous 1993-2001 conduct. And there was plentiful evidence concerning the 1993-2001 period. William McCoy and Jose Salinas testified exclusively to that

time period. Charles Cory, Daniel, Mott testified extensively about that time period. Most of this evidence concerned other drug dealings with people besides McCuiston. It was during this period of time that McCuiston was primarily a small time operator.

Also important is the fact that McCuiston was twelve years old in 1993. Ordinarily, evidence of conduct committed before the age of eighteen is not admissible in federal court. The Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5042, requires the Attorney General to certify that "there is a substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction," and that one of three factors is satisfied before proceeding against any juvenile[3] in federal court. 18 U.S.C. § 5032. This certification requirement is jurisdictional, and a juvenile may not be prosecuted in federal court absent certification. *United States v. Tolliver*, 61 F.3d 1189, 1202 (5th Cir. 1995); *see also United States v. Wong*, 40 F.3d 1347, 1363 (2nd Cir. 1994), *cert. denied*, 516 U.S. 870 (1995)

---

[3] "Juvenile" is defined at 18 U.S.C. § 5031 as,

> [A] person who has not attained his eighteenth birthday, or for the purpose of proceedings and disposition under this chapter for an alleged act of juvenile delinquency, a person who has not attained his twenty-first birthday, and "juvenile delinquency" is the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult or a violation by such a person of section 922(x).

(collecting cases). McCuiston became involved in the charged conspiracy before his eighteenth birthday[4], but was indicted well after his eighteenth birthday. Absent Attorney General certification the district court was without subject matter jurisdiction over McCuiston.

It is well established that federal courts have jurisdiction over conspiracies begun while a defendant was a minor but completed after his eighteenth birthday. "The [JDA] does not...prevent an adult criminal defendant from being tried as an adult simply because he first became embroiled in the conspiracy with which he is charged while still a minor...." *Tolliver*; *United States v. Wong*, 40 F.3d at 1365; *United States v. Doerr*, 886 F.2d 944, 969 (7th Cir. 1989) ("The protections of the Juvenile Delinquency Act are designed 'to guarantee certain basic rights to juveniles who come within Federal jurisdiction.' Thus the protections of the Act are not applicable to a defendant...who is not a juvenile and has not committed an act of juvenile delinquency."). However, for the defendant to be charged with a conspiracy that transcends his eighteenth birthday, he must do something to ratify his involvement in the conspiracy after he reaches the age of majority. *See United States v. Maddox*, 944 F.2d 1223, 1233 (6th Cir. 1991), *cert. denied,* 502 U.S. 992, 112 S. Ct. 610, 116 L. Ed. 2d 633 (1991):

---

[4] The PSIR reflects that McCuiston born on November 28, 1980. McCuiston was under the age of 18 during all the relevant events that happened in Corpus Christi which culminated in the police arrest of McCoy on July 1, 1998.

> An eighteen year-old who continues to participate in a conspiracy after his eighteenth birthday commits an act in violation of law after his birthday. We do not believe, however, that a person who does absolutely nothing to further the conspiracy or to reaffirm membership in it after his eighteenth birthday can be held criminally liable as an adult in federal court. . . . This is somewhat analogous to the concept of ratification in contract law. An "infant" cannot enter a contract prior to the age of majority, but an infant can be held liable if he acts to ratify the contract, either explicitly or implicitly. *See Generally*, J. Calamari & J. Perillo, Contracts § 8-4 (3d ed. 1987).

Had the conspiracy been properly pleaded as a 2001-2004 conspiracy, none of McCuiston's juvenile actions would have been admissible. Instead, the 1993-2004 conduct was improperly pleaded, and evidence of McCuiston's juvenile conduct was admitted on the theory that he ratified his conduct by remaining in the same conspiracy. But McCuiston did not remain in the same conspiracy from 1993 to 2004. There is a decisive difference between McCuiston's involvement in drugs from 1993 to 1998 and that of 2001 to 2004; the intervening period also fails to demonstrate any ongoing conspiracy.

The variance also had a measurable impact on McCuiston's sentence. Had McCuiston only been charged with the 2001 to 2004 conspiracy, and the Government proved that conspiracy, then McCuiston's criminal history would have scored

differently. This is because the PSIR computed his criminal history as if he were convicted of being in a 1993 to 2004 conspiracy. According to the 1993-2004 conspiracy, McCuiston committed the charged offense while he was on juvenile probation and less than two years after his release from juvenile custody.[5] PSIR at ¶ 64-65. Because of Guidelines § 4A1.1(d) and (e), this resulted in the additional of three criminal history points, enough to raise McCuiston from a criminal history category III to a category IV.

All of the evidence against McCuiston came from people who were working off substantial prison sentences in return for testimony. McCuiston's trial attorney attempted to impeach each and every one of them. The transcript and paper record cannot tell us which witnesses the jury believed and which it did not. Perhaps the jury mostly believed Salinas and McCoy, the individuals who testified exclusively about McCuiston's activities in the 1993 to 1998 period. It might be that without their testimony, the jury would have acquitted McCuiston. The important thing to recognize, though, is that the Government was permitted to put on any testimony it liked to show that McCuiston was a drug dealer by virtue of its allegation that there was a single conspiracy from 1993 to 2004. The government gained great trial advantage from this allegation. Evidentiary issues were skirted because they could no longer be described as extraneous. The number

---

[5] McCuiston was on juvenile probation from 1993 until 1995, and on juvenile parole during 1998 and 1999. He was released from custody on juvenile charges on March 16, 1998. PSIR at ¶ 64-65.

of available witnesses increased, as any who could testify about anything at all involving McCuiston at any time period could bolster the testimony of others.

Now that the government has had all of these advantages, it must be held to account. The considerable evidentiary advantage must be based on being able to prove the conspiracy upon which the evidentiary advantages were derived. In failing to prove the over-arching 1993 to 2004 conspiracy, it is fundamentally unfair to allow this verdict to stand.

## II. A United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; namely, that evidence of juvenile conduct from the age of twelve can be admitted and form the basis of adult criminal liability.

This point is related to the harm McCuiston suffered as a result of the variance, discussed *supra*. In addition to lack of jurisdiction over pre-eighteen conduct, the district court erred in not instructing the jury and in holding McCuiston liable for pre-eighteen conduct.

The circuits are split on whether the district court must instruct the jury to disregard evidence of pre-eighteen conduct when assessing guilt. However, because the post-eighteenth birthday evidence was sufficient to support the jury's verdict, the Fifth Circuit did not reach the issue in *United States v. Tolliver*, 61 F.3d 1189, 1202 (5th Cir. 1995). The

*Tolliver* court left the issue of whether a jury instruction was required unanswered. What *Tolliver* left undecided, the Fifth Circuit in this case has decided and exacerbated the Circuit split.

Even though it did not issue the issue's merits, the *Tolliver* court cited *United States v. Maddox*, 944 F.2d at 1233, wherein the Sixth Circuit stated

> The government must make a threshold demonstration that the defendant who joined a conspiracy prior to his eighteenth birthday "ratified" his membership in that conspiracy after his eighteenth birthday. **He cannot be held liable for pre-eighteen conduct,** but such conduct can, of course, be relevant to put post-eighteen actions in proper context. (emphasis added)

The lack of jury instruction in McCuiston's case permitted the jury to consider five years of juvenile conduct. This was not a case of a seventeen or sixteen year old. This involved conduct of the juvenile McCuiston that began when he was **twelve**. Given the enormous amount of time (five years) that this period covered, the young age at which the involvement began, and the substantial federal interest in prosecuting minors under the Juvenile Delinquency Act and not the Criminal Code, the failure to instruct the jury affected McCuiston's substantial rights.

The failure to instruct the jury allowed the Court to find McCuiston guilty of the indicted charge, namely, that he participated in a conspiracy from 1993 to 2004. The Sixth Circuit holds that a juvenile cannot be held liable for pre-eighteen

conduct, whereas the Fifth Circuit has decided that a juvenile can by affirming the court's finding him guilty of the charged conspiracy. This split in the Circuits should be resolved by the Court; McCuiston believes that the *Maddox* approach is preferable and should result in his acquittal.

## III. A United States court of appeals has decided an important federal question in a way that conflicts with a relevant decision of this Court; namely, the determination of whether inclusion of relevant conduct in computing the advisory Guideline sentence violated McCuiston's Sixth Amendment rights.

At the sentencing hearing for McCuiston, McCuiston objected to using the guideline sentence for 150 kilograms or more of methamphetamine. McCuiston objected orally and in writing, and argued that the proper amount of cocaine to be used in the Guidelines was 500 grams, because this was the amount alleged in the indictment and that was the amount submitted to the jury. His objection was predicated on due process and Sixth Amendment grounds.

The district court was sympathetic, stating that it thought that these were "good objections" but that it was not the law in the Fifth Circuit and therefore had to overrule them. Had the objection been sustained, it would have made a difference of

six levels in McCuiston's guideline sentence. The district court made a finding on the record that the jury did not find more than 500 grams of methamphetamine nor did McCuiston otherwise admit to it. Vol.7 at 31.

The Fifth Circuit had decided this point - that a district court may, post-*Booker*, consider relevant conduct that is neither judicially admitted nor proven to a jury. Nevertheless, McCuiston believes *Alonzo* is wrongly decided and brings this point on this application. Under *Booker*, the district court violated McCuiston's rights by considering the advisory guideline range for relevant conduct not charged in the indictment, found by a jury, or admitted by McCuiston.

## CONCLUSION

For the foregoing reasons, I respectfully urge that the writ of certiorari be granted, and the case considered on its merits.

Respectfully submitted,

Stephen M. Orr
804 Rio Grande
Austin, Texas 78701
(512) 472-8392
FAX (512) 473-8417
Counsel for Petitioner

# APPENDIX

**UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BRIAN MCCUISTON, Defendant-Appellant.**

**No. 05-40908 Summary Calendar**

**UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

*2006 U.S. App. LEXIS 16292*

**June 28, 2006, Filed**

**PRIOR HISTORY:** Appeal from the United States District Court for the Southern District of Texas. No. 2:04-CR-676-2.

**DISPOSITION:** AFFIRMED.

**COUNSEL:** For UNITED STATES OF AMERICA, Plaintiff - Appellee: James Lee Turner, Assistant US Attorney, Kathlyn Giannaula Snyder, Assistant US Attorney, US Attorney's Office, Southern District of Texas, Houston, TX.

For BRIAN MCCUISTON, Defendant - Appellant: Stephen M Orr, Orr & Olavson, Austin, TX.

**JUDGES:** Before JOLLY, DAVIS, and OWEN, Circuit Judges.

**OPINION:** PER CURIAM: *

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Brian McCuiston challenges his conviction for conspiracy to possess with intent to distribute more than 500 grams of methamphetamine. The indictment alleged that the conspiracy [*2] began on January 1, 1993, and continued until the time of the indictment, November 23, 2004. McCuiston argues that a fatal variance existed between the indictment, which alleged a single conspiracy, and the proof at trial, which purportedly established multiple conspiracies. Viewed in the light most favorable to the Government, McCuiston and his coconspirators became friends in childhood when they began selling small amounts of methamphetamine under the supervision of others in the CC Mob. When the CC Mob collapsed the three friends banded together and moved to Oregon and then Kansas to escape law enforcement and to continue to sell methamphetamine. As time went on

the three continued their concerted methamphetamine distributing to the point where they operated in different cities. This view of the evidence would not preclude a finding of a single conspiracy beyond a reasonable doubt. *United States v. Morrow, 177 F.3d 272, 291 (5th Cir. 1999)*; *United States v. DeVarona, 872 F.2d 114, 118 (5th Cir. 1989).*

McCuiston argues, based on his assertion that there were multiple conspiracies, that the district court did not have jurisdiction over a prosecution [*3] for his acts as a juvenile. McCuiston concedes that if that the Government did prove a single conspiracy, his argument is defeated by *United States v. Tolliver, 61 F.3d 1189, 1196 (5th Cir. 1995)*, vacated and remanded on other grounds, *516 U.S. 1105, 116 S. Ct. 900, 133 L. Ed. 2d 834 (1996)*(remanded for further consideration in light of *Bailey v. United States, 516 U.S. 137, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995))*

McCuiston argues that the district court should have instructed the jury that they could not consider those acts when determining guilt. McCuiston con-cedes that he did not raise this issue in the district court and that it may be reviewed only for plain error. As McCuiston also concedes that the circuits are split on whether a jury may consider juvenile conduct when assessing guilt for a conspiracy that was ratified after the age of majority, it is not plain that a failure to instruct the jury as now suggested by McCuiston is error. See

*United States v. Olano, 507 U.S. 725, 731-37, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993).*

McCuiston argues that the district court erred by allowing testimony regarding his gang, CC Mob, affiliation. He argues that the gang evidence was [*4] extrinsic to his offense and that the evidence should have been excluded under *FED. R. EVID. 404(b)*, as it was irrelevant to any issue other than character and its prejudicial impact substantially outweighed any probative nature. This court reviews the district court's admission of testimony for an abuse of discretion. *United States v. Clements, 73 F.3d 1330, 1334 (5th Cir. 1996).* "Evidence that is inextricably intertwined with the evidence used to prove a crime charged is not extrinsic evidence under *Rule 404(b)*. Such evidence is considered intrinsic and is admissible so that the jury may evaluate all the circumstances under which the defendant acted." *United States v. Royal, 972 F.2d 643, 647 (5th Cir. 1992)*(citation and quotation omitted). That McCuiston and his coconspirators were all initiated into the business of selling methamphetamine and other drugs at ages as early as 12 as part of the CC Mob is part of the relationship formed between these three men and would help the jury to determine the nature of that bond. The evidence was intrinsic to showing that McCuiston, Daniel, and Mott were involved in the same [*5] conspiracy that spanned so many years and endured under changing conditions. *United States v. Stovall, 825 F.2d 817, 825 (5th Cir.)*,

amended, *833 F.2d 526 (1987)*. Additionally, the district court gave the jury a limiting instruction regarding the gang evidence. The jury was instructed that it could not consider the gang evidence as evidence of guilt generally and could consider it only to determine whether McCuiston participated in the conspiracy. Jurors are presumed to follow their instructions. *United States v. Wyly, 193 F.3d 289, 299 (5th Cir. 1999)*. McCuiston has not shown that the district court abused its discretion in admitting the evidence and instructing the jury on how to use it.

McCuiston argues that the district court erred by using more than 500 grams of methamphetamine, the amount charged in the indictment, to calculate his base offense level. After Booker, the court continues to review the district court's interpretation and application of the Guidelines de novo and its factual determinations for clear error. *United States v. Charon, 442 F.3d 881, 887 (5th Cir. 2006)*. The district court's determination -[*6] of the amount of methamphetamine relevant to the conspiracy was based on facts contained in the presentence report (PSR). On appeal, McCuiston does not assert that the information in the PSR was materially untrue, inaccurate, or unreliable. *United States v. Huerta, 182 F.3d 361, 364 (5th Cir. 1999)*.

McCuiston argues that the district court somehow erred in sentencing him because the court "did not feel able to treat the Guidelines as truly

advisory." In this case, the district court noted that consideration of the factors in *18 U.S.C. ß 3553* had persuaded the court to impose a sentence that was 44 months below the bottom of the applicable range. Contrary to McCuiston's argument, it is plain from the record that the district court was aware that the Guidelines were advisory after Booker. The Government has not appealed the sentence and McCuiston has not shown that the sentence imposed by the district court was unreasonable. *United States v. Mares, 402 F.3d 511, 519 (5th Cir. 2005)*, cert. denied, *126 S. Ct. 43, 163 L. Ed. 2d 76 (2005)*.

AFFIRMED.